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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 799

UNITED STATES OF AMERICA, APPELLANT

v.

THE PHILADELPHIA NATIONAL BANK AND GIRARD TRUST CORN EXCHANGE BANK

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF THE UNITED STATES IN OPPOSITION TO THE MOTIONS TO AFFIRM

In the Jurisdictional Statement, it was demonstrated that substantial questions of major public importance are presented in this case. At issue are the standards of the Sherman Act governing horizontal mergers of competitors, in particular competing commercial banks, and their application to the proposed merger of the second and third largest commercial banks in the Philadelphia metropolitan area. Additional substantial questions in this case concern the applicability of Section 7 of the Clayton Act to bank mergers and, if applicable, the validity of the proposed merger under Section 7. It was further

ie Jurisdictional Statement that the district
d in rejecting, as a relevant geographic
ie four-county Philadelphia metropolitan
ich appellees maintain offices, and in hold-
e merger would not violate the Sherman
s not subject to, and would not violate, the

s' motions to affirm are limited to arguing
ayton Act is not applicable and that the
uld not be an unreasonable restraint of
olation of the Sherman Act. These con-
re largely anticipated in the Jurisdictional
. Accordingly, this brief in opposition to
ns to Affirm will be limited to a few points
appellees' discussion of the effect of the
n competition, upon which supplementary
nay be helpful to the Court.

es' motions give the misleading impres-
issues here are primarily or wholly fac-
t the decision below can be affirmed on
hat the district court believed their wit-
the contrary, the fundamental fault with
below, and with appellees' contentions, is
s underlying assumption as to the Sher-
ndard governing the validity of horizontal

apparently believe that a merger cannot
ed under the Sherman Act because of any
mination of competition between merging
(PNB Mot. 8–9; Gir. Mot. 16),[1] or any

ot." refers to NB's Motion to Affirm; "Gir. Mot."
rd's Motion Affirm.

resulting increase in size or market share (PNB Mot. 12; Gir. Mot. 14), unless and until the merged company attains the power to control or restrict the market. This proposition is explicitly advanced by Girard (Gir. Mot. 13–14) and underlies the reliance of both appellees upon testimony and market data concerning the continued existence of other competing Philadelphia area banks (PNB Mot. 9, 10, 12; Gir. Mot. 16, 18–19).

But Section 1 of the Sherman Act imposes a much more restrictive rule upon horizontal mergers. The power to control prices or exclude competitors is the touchstone of monopolization in violation of Section 2 of the Sherman Act,[2] not of a restraint of trade violating Section 1. The railroad cases reviewed in the Jurisdictional Statement, pp. 20–21, struck down mergers of competing companies on the express ground that the elimination of competition between the merging companies, in the circumstances, was sufficient to constitute an unreasonable restraint of trade notwithstanding the continued existence of other competitors. In *United States* v. *Columbia Steel Co.*, 334 U.S. 495, relied upon by appellees, the Court also examined the extent to which competition would be diminished. The Court did not rule that power to control the market was required in order to show a violation; nor did the Court even list such power among the factors pertinent to an appraisal of the validity of mergers under Section 1, namely, dollar volume, percentage of business controlled, strength of

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[2] See *United States* v. *duPont & Co.*, 351 U.S. 377, 391.

remaining competition, purpose of the merger, and probable development of the industry (334 U.S. at 527–528). Stating that "[t]he relative effect of percentage command of a market varies with the setting" (*id.* at 528), the Court in *Columbia Steel* held that certain market conditions established the lawfulness of a combination of companies selling (it was doubtfully assumed) 13% and 11% of structural steel products in eleven western states (*id.* at 529–530). In the Jurisdictional Statement, pp. 22–28, it was shown that an analysis of the same factors considered by the Court in *Columbia Steel* leads to the finding of unreasonable restraint in the present case.

In *Columbia Steel*, as appellees note (PNB Mot. 9–10; Gir. Mot. 16, fn.), the Court distinguished the railroad merger cases cited by the government. Appellees ignore, however, that the Court likewise distinguished various merger cases cited by the steel companies and stated that the precedents relied upon by both parties were factually "so dissimilar * * * that they furnish little guidance" (334 U.S. at 531). *Columbia Steel* is not inconsistent with the railroad merger cases and does not impair their vitality in the analogous situation here presented, that of the merger of two great banks with assets of one billion and three-quarters billion dollars, which are directly competitive throughout their operations.[3]

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[3] In addition to *Columbia Steel*, Girard, by citing two quite inapposite cases, seeks to support the proposition that elimination of competition is not enough to violate the Sherman Act. *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, did not involve a merger but an association of firms to meet a depres-

2. Appellees are unduly modest when they describe the market position of the proposed merged bank as only "one bank out of 41 [which] is larger than any of the others in the Philadelphia area" (Gir. Mot. 14; see PNB Mot. 12). The fact is that the proposed merger of the second and third largest banks in the area would result in a leading bank more than one-and-a-half times the size of its nearest rival and more than three times the size of the next largest bank. The merged bank would have 35.7% of the assets held by the 41 commercial banks with head offices in the four-county Philadelphia area, 40.8% of their commercial and industrial loans, 35.8% of their deposits. (See Jur. St., pp. 5-8.)

Moreover, there is no substance in appellees' disclaimer that preponderant size offers no competitive advantage over the smaller Philadelphia banks (PNB Mot. 12; Gir. Mot. 14). Their argument in this regard conflicts with their own proposed findings as to some of the alleged benefits from the merger—for example, that the merged bank would be able to make "greater risk loans" (Defs. Fdg. 201). The merged bank would have power and influence commensurate with its size, far greater than the much smaller banks numbered by appellees among their 40

sion-borne crisis in the coal industry. *Erie Sand & Gravel Co. v. Federal Trade Commission*, 291 F. 2d 279 (C.A. 3), involved the validity of a merger under Section 7 of the Clayton Act; but the Third Circuit did no more than remand to the Commission to reconsider its determination in the light of a necessary correction in the geographic market, conceded by the Commission.

competitors. Thus, PNB-Girard, with almost $1 billion in lendable funds, would be a controlling factor in a great number of economic decisions. Smaller banks, with a few million dollars in lendable funds, would exhaust their resources in a comparatively few transactions, and they could not provide effective competitive alternatives. (See Jur. St., pp. 23–25.)

Appellee Girard's idea of effective competition is aptly illustrated by its assertion (Gir. Mot. 16) that "three was the largest number of alternative [banking] choices said by any witness to be necessary to provide every competitive advantage to a prospective borrower." The only testimony is that access to three banks will determine whether a loan is "bankable" (see Tr. 2913–2914, 3362). Once bankable, however, there would still remain a wide range of possible credit appraisals, loan amounts, interest rates, repayment and other terms. Although Girard urges that "competition among banks is, for practical purposes, restricted to service" (Gir. Mot. 14), the importance of banking competition was recently reemphasized by the Federal Reserve Board. The Board denied an application to merge the Long Island Trust Co. with the Chemical Bank New York Trust Co., on the ground that the proposed merger "would reduce the opportunity for preserving a variety of banking alternatives of varying size, each offering its own advantages to the public. Competition throughout all the ranges of banking size and services is in the public interest. * * * The merger would eliminate a prosperous and sound alternative source of banking serv-

ices, and would substitute for it a large and powerful institution which would, in competing with other such institutions, diminish the prospects of smaller banks in the County." *In the Matter of the Application of Chemical Bank New York Trust Co.*, Federal Reserve Board, April 30, 1962, pp. 14, 15. Thus, the governmental authorities which supervise banks believe it imperative to preserve the precise kind of banking competition which appellees insist is insignificant.[4]

3. The discussion of "the percentage of business controlled"[5] by the proposed merged bank in the Jurisdictional Statement, pp. 5-8, 22-23, was based upon extensive statistical data in the record, which compared the two appellees and the proposed merged bank with the other commercial banks having head offices in the Philadelphia area. The district court accepted these data in its analysis of the four-county market (Jur. St. App. 6a-7a, 34a-35a).

[4] Girard's confidence in the adequacy of three banks may be contrasted to the Congressional understanding of what constitutes effective competition, expressed in amending Section 7 of the Clayton Act in 1950. The Senate Report noted, quoting a Federal Trade Commission report, that a market containing only "three or four large concerns" is an oligopoly which "is likely to be characterized by avoidance of price competition and by respect on the part of each concern for the vested interest of its rival." S. Rep. No. 1775, 81st Cong., 2d Sess., p. 5. The policy of Section 7 is relevant to interpretation of the Sherman Act. See *United States* v. *Columbia Steel Co.*, 334 U.S. at 507, fn. 7; *Times-Picayune* v. *United States*, 345 U.S. 594, 610-611.

[5] *United States* v. *Columbia Steel Co.*, *supra*, 334 U.S. at 527.

Appellees challenge the government statistics on two grounds (PNB Mot. 11; Gir. Mot. 17). First, they object that the government utilized total figures for assets, loans, deposits, etc., of the Philadelphia-area banks, rather than only that part of the banks' business which originated within the area. But the predominant share of the proposed merged bank in the aggregate business done by Philadelphia-area banks does not appear materially different if confined to local business.[6] In any event, the government believes that total figures were properly used to present an accurate picture of the relative strength of the relevant banks.

Second, appellees contend that the government's statistics fail to account for business originating within the four-county Philadelphia area which is handled by banks in New York and elsewhere. But again, this characteristic of the statistics does not detract from the significance of PNB and Girard's market shares. Appellees' witnesses offered little more than speculation together with general statements concerning solicitation of business by outside banks from the Philadelphia area (*e.g.*, Tr. 3102, 3450–3451, 3709, 3751–3753). The only statistical information in the record indicates that in 1955 the large New York banks had only about

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[6] The distribution of PNB and Girard business within and without the four-county area is shown in the record (Statistical Tables in Govt. Proposed Fdgs. 258–282), and there is no reason to believe that the other large banks have a much different distribution. The smaller banks are likely to have less activity outside the area, but the relative amount of their business is so small that it would not materially alter the shares of PNB and Girard utilized by the court below.

$113,000,000 in loans to Philadelphia customers (Ex. D-1, p. 65, n. 3; compare Jur. St. 6-7). Moreover, banks outside the area are competitive only for a very special kind of business, particularly large loans. As Girard's president stated, borrowers of under $1 million would not normally go beyond banks in the same city (Tr. 3817). The president of the Philadelphia area's fifth largest bank testified that he had not lost business to New York banks (Tr. 2071-2072). As a practical matter, banks elsewhere are certainly not available alternatives for the range of services comprising commercial banking, the line of commerce found by the district court.

In the Jurisdictional Statement, pp. 16-18, the four-county Philadelphia area was shown to be a proper geographic market in which to analyze the impact of the merger, and, as the Federal Reserve Board stated, "[T]he principal competitive effects of the proposal will * * * be local and not international or national" (Ex. G-161, p. 2). In examining these "principal competitive effects," the government properly focused on the "local" market comprising commercial banks in the Philadelphia area and presented statistics showing the relative positions of PNB, Girard and the proposed merged bank among the four-county banks. These data, and the other evidence in the record outlined in the Jurisdictional Statement, show that the proposed merger is an

unreasonable restraint of trade in violation of the Sherman Act.

For the foregoing reasons, and for the reasons set forth in the government's Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted.

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MAY 1962.

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[3] Girard's alleged "Summary of Evidence" (Gir. Mot. 22-[illegible]) is incomplete and misleading. To take one of many examples, Girard cites the president of Central Penn National Bank as saying that competition from New York is very strong (Gir. Mot. 24), but omits his testimony that he had not lost any loans or deposits to New York banks (Tr. 2071-2072).

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